CHAPTER 7

USER GENERATED CONTENT

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HEADLINE OF ISSUES

- Author, editor and publisher
- User generated content
- Liability models
- Radion, television, websites

INTRODUCTION

Since its arrival in 2005, user generated content (UGC) has grown explosively. This vast new trend that allows users to play an active role in the publication of content creates many great opportunities. However, it also opens doors for malicious intent. The difficulties to combat illegal or otherwise harmful material constitute major challenges for the further development of UGC.

In a complicated system involving many different actors, who does one address when illegal or harmful material is found online? Who can be held liable for damage? This chapter aims to discuss the conceptual framework for legal liability for UGC, by examining normative definitions and underlying rationales of existing liability models and by comparing the roles of traditional actors in the information value chain, on the one hand, and new intermediaries, on the other hand.[1] It aspires to formulate some assessments in view of a clearer definition of the scope of legal liability of new UGC intermediaries for illegal and harmful content disseminated via their websites.

USER GENERATED CONTENT

The term "User-Generated Content" or UGC appeared for the first time around 2005. Since then, UGC is playing an increasingly important role in the media landscape. Today, it is a booming business. The widespread broadband technology and high-quality electronic material at everybody's reach have stimulated the user to become an active participant in Web 2.0.

Defining UGC is a difficult task, since there is no widely accepted official definition.

[1] This chapter forms an update of our article previously published as: P Valcke & M Lenaerts. "Who's Author, Editor and Publisher in User-Generated Content? Applying Traditional Media Concepts to UGC Providers", (2010) (24:1) *International Review of Law, Computers & Technology* 119-131.

Generally, UGC is understood very broadly to include all content put online by users, whether it was created by them or not.[2]

UGC exists in many forms. Traditional forms include blogs (eg Blogger), wikis (like Wikipedia), multimedia sharing services for photographs (such as Flickr), videos (eg YouTube or Dailymotion), podcasts (such as Odeo) and tags. More recent are the social and professional networking websites (like Facebook and LinkedIn) and the virtual worlds (eg Secondlife). New types of services and variations on existing services keep appearing every day, such as for talent search (eg SellaBand), mobile specific services (like ShoZu) and social bookmarking websites (including Mister Wong). Some governments are even starting to use UGC websites as a way of communicating with their citizens (such as FixMyStreet). UGC can be text-based, graphic-based, audio, video or mixed. It can also include video games and virtual objects.[3]

As a result of the constant appearance of new web applications and the evolution of technology, UGC is permanently changing. This evolving and multifaceted character of UGC increases the difficulty to formulate a time-proof definition and to regulate it appropriately.

The growth of UGC has been explosive since 2005. The Flickr photograph sharing website, for instance, grew to over 518 million of shared photographs in 2012. The number of YouTube visitors increased until over 1 billion each month and the number of blogs kept growing steadily from 40 million to 180 million. The percentage of active internet users watching videos online increased from 30% to over 80% between 2005 and 2012. The number of users engaged in microblogging increased from 14% in 2009 to 42% in 2012 and those reading blogs online increased from 53% to 76%. Every minute, seventy two hours of video are uploaded to YouTube.[4]

The arrival of UGC is part of a broader evolution in the internet world. UGC is a phenomenon of Web 2.0 (the *read-write web*), in opposition to Web 1.0 (the *read only web*). Where Web 1.0 consisted of a one-way traffic from producers of content to a mostly passive public, Web 2.0 involves a broad interaction between traditional content producers on the one hand, and more active users, who are participating, commenting and also generating content themselves on the other hand. This has created a whole new collective intelligence to which all can add. This evolution and the appearance of UGC have many positive consequences. UGC leads to a better understanding and cooperation between people and organisations. Besides that, it plays a major role in the democratisation of the news process, by providing very diverse additional sources of information. UGC also represents an additional

[2] It is worthwhile to note the difference between UGC and "user created content", which is limited to content that was actually created by users, requiring a certain amount of creative effort, outside of professional routines and practices (OECD Report: Participative Web and User-Created Content, 2007).

[3] In their study carried out in 2008 for the European Commission on *User-Created-Content: Supporting a participative Information Society*, IDATE, TNO and IViR found that photographs were at that moment the most popular form of UGC, followed by video material and text, http://www.ivir.nl/publications/helberger/User_created_content.pdf.

[4] Sources: Technorati, Flickr, YouTube, NM Incite, Alexa, Comscore, internetworldstats.com, McCann, Power to the People – Social Media Tracker Wave 3 (March 2008), The Business of Social – Social Tracker Wave 6 (2012) and Google (2009). Numbers are approximate.

control of the mainstream media. It facilitates social networking. Finally, it favors the growth of user autonomy and encourages cultural diversity.

But, on the other hand, the participative and uncontrolled character of UGC also holds dangers. UGC opens doors to hate speech, privacy invasions, intellectual property infringements, defamation, pornography and child pornography and other undesirable content such as suicide websites and newsgroups, websites encouraging eating disorders such as anorexia, violent or shocking images or insults to religious groups. Combating such illegal or undesirable content is difficult because the author is often hard to find. But when the author is unknown, who is responsible for such content? Under which circumstances can you address the messenger to claim for damages? And is the UGC website provider a mere "messenger" or does he fulfill a more active role? In the new context of Web 2.0, we have to ask ourselves who takes up the role as author, the editor and the publisher of content published online. A more fundamental question is whether we can still use these traditional concepts at all to define legal liability for UGC. The answer to these questions is crucial, both for victims of [online abuse,] illegal or harmful content and for the alleged infringer, but also for the website providers, whose service provision and business model heavily depend on what is legally required from them. To what extent can these websites be held responsible for the lawfulness of UGC and the activities of users on their websites (eg that users observe copyright law, data protection law or the rules on harmful content)?

This chapter will explore the conceptual framework for defining the scope of legal liability of new UGC intermediaries for illegal and harmful content disseminated via their websites. The existing liability models in media law will be examined and compared to the special features of UGC. We will start by presenting the dichotomy between the publisher and the hosting model that was put forward as the main distinction in the 2008 study by IDATE, TNO and IViR on *User-Created-Content: Supporting a Participative Information Society*.[5] We will then further unravel these models (arguing that there is actually no single publishing model, given the significant differences between print media and audiovisual media in terms of liability regimes), and take a more detailed look at normative definitions and underlying rationales of liability rules for print publications, radio and television broadcasting and internet intermediaries. Finally, we will formulate preliminary thoughts on where to place UGC within these frameworks.

Existing Liability Models

The Dichotomy Between the Publisher and the Hosting Model

In their study on User-Created-Content for the European Commission, IDATE, TNO and IViR, distinguish between two models of legal liability for third party content:

- On the one hand, they discuss the *publisher model,* which originates in media law and covers both print media and broadcasting media. Under this model, the full liability for the content that is disseminated is laid

[5] See above, footnote 3.

on the publisher, independently if the content is his own or third party content. The underlying rationale is to protect the public's interest in the quality and lawfulness of media content;

- On the other hand, they analyse the *hosting model*, which relates to telecommunications law and is a model of liability exemption for certain technical services (including hosting services). Unlike in the publisher-model, liability for third party content in the hosting-model is the exception, not the rule. This can be explained by the difference in policy considerations: in telecommunications, the seemingless functioning of communications networks, net neutrality, universal carrier obligations and protection of users' privacy and communications secrecy are paramount. This is, in particular, reflected in the [limited] liability exemption foreseen in the eCommerce Directive *(infra)* for hosting services for illegal or harmful content posted by users; this exemption covers both criminal and civil liability as well as direct and indirect liability.

According to the study, UGC website providers *"do not fit well into either of the two models. The majority of UCC [websites] act in a grey zone between the provision of technical and content-related activities"*. In other words, they are situated exactly in between these two models, none of them being applicable. This intermediary position gives rise to difficult questions regarding their responsibility for third party content, which are part of an ongoing broader discussion of the rights and obligations of information intermediaries, such as ISPs, search engines, EPGs, web fora, etc.

As the study rightly points out, the various options to deal with different kinds of information intermediaries basically boil down to the following three: should we a) subject them to full publisher-style prior-publication monitoring obligations, b) to neutrality with regard to the content transmitted, with limited post-publication policing duties or is there c) a need for a new, specifically tailored approach?

In order to make an informed decision, it is important to understand where the different models came from and what is lying behind the existing normative definitions (such as "editor", "publisher", "broadcaster", or "host"). Therefore, in the following, we will take a closer look at the various liability rules as they exist in Belgian law and which are three-fold, rather than two-fold. The regulation of liability for print publications (books, newspapers and magazines), on the one hand, and for broadcasting (radio and television), on the other hand, will be studied as examples of the publisher model. The liability of internet intermediaries is regulated following the hosting model.

Liability for Print Publications

In Belgium, liability for print publications is regulated by a "cascade" system laid down in the Belgian Constitution of 1831. Article 25, al. 2, of the Belgian Constitution provides:

> *"When the author is known and resident in Belgium, neither the editor/publisher, nor the printer, nor the distributor can be prosecuted."*

Hence, for a press crime, in principle only the author can be held liable. This includes both criminal and civil liability. Only when the author is unknown, the other actors in the production chain can be held liable, in the following order: the editor or publisher, the printer and finally, the bookstore or kiosk.

This rule forms an essential part of the constitutional protection of the press freedom, which yields immunity against censorship from the State. It is linked to Article 25, al. 1, of the Constitution, which explicitly prohibits preventive censorship for the print press, on the one hand, and Article 150 of the Constitution, which provides that *a people's jury*, the "Assisenhof" and not the regular criminal courts, will decide on press crimes (except when racism or xenophobia is alleged), on the other hand. These provisions reflect the – at that time – prevailing view on the relation between the State and the media: above all, the State had a duty of abstention and had to be prevented from taking any *ex ante* measures which would result in public censorship of print publications. The repressive system that is anchored in the Constitution implies that, only when freedom of expression is abused during the exercise of that freedom, and a press crime is committed, *a posteriori* sanctions can be imposed; not by the State or by any public institution, but only by the citizens themselves. On top of that, the cascade system aims to shield the individual journalist from possible private censorship from the editor or the publisher. In order to keep the actors further down the production process from censoring publications that might be considered dangerous or risky, the law exempts them from liability, insofar the author is known and resident in Belgium.

However, in previous years, the constitutional cascade system has found itself regularly undermined by more recent provisions of law, or by a strict interpretation by courts.

- The cascade system only applies to "press crimes". According to the Constitution, a press crime is a regular crime committed by means of the press. In case law and legal doctrine, four criteria have been put forward to define the term more precisely. A press crime is (1) the expression of an opinion (2) by means of print, (3) distributed towards the public and (4) punishable by law. The expression of an opinion is interpreted narrowly, excluding the reporting of mere factual information. The condition of punishableness requires an explicit law prohibiting the specific act. Further, the text has to be circulated under people who did not have a previous connection with the author; a mere public exhibition of one copy or mailing to a limited list of people does not suffice. Finally, press crimes only concern printed texts. Photographs or images do not fall under the scope of the constitutional cascade system, since in case law they are still considered not to express an opinion. Radio and television broadcasting, as well as digital information channels like CD's or DVD's, are also obviously excluded as they do not offer information in printed form;[6]
- In case of general tort, the editor or publisher, the printer, or the distributor can still be held liable;
- The editor and publisher can also separately be held liable for the layout,

[6] P Martens, *Mediarecht voor journalisten*, 2005, Garant, 17, 26-27.

the titles and subtitles or pictures with comments they added [Court of First Instance Brussels, 25 April 2000, *Auteurs & Media* 2000, p 466];

- In principle, in Belgian labour law, an employee can only be held liable for fraud or for a severe fault during the exercise of his employment contract. For a light fault he only incurs liability when it happens on a regular basis. Otherwise, it is the employer who entirely carries the liability for damages caused by his employees. In the past, courts have applied this regulation to journalists, which led to the editor or the publisher being liable for regular light faults of their journalists. However, the Belgian Constitutional Court, considering there would be a real risk of censorship, has ruled on 22 March 2006 that this provision does not apply to journalists, even though they might have an employment contract. Only the journalist is liable for his content. According to the Court, labour law cannot change constitutional law; deciding otherwise would mean a violation of Article 25 of the Constitution [Constitutional Court, 22 March 2006, discussed in E. Brewaeys, "Recente rechtspraak van het Arbitragehof over persvrijheid", *Rechtskundig Weekblad* 2006-07, pp 1342-1347].

Recently, this "erosion" of the constitutional cascade system has been countered by the fact that the Belgian courts (up to the Court of Cassation) have qualified online publications as "press crimes". One example is a judgment of 13 February 2007, in which the Mons Criminal Court ruled that the notion "press" should be interpreted broadly because of the evolution of technology. It considered that since internet forums have become commonly used channels for the transmission of information and opinions, punishable comments on a website should be qualified as press crimes. In this case, however, the Court stressed that the same punishable information was later also published in a regular newspaper. In the appeal decision, rendered on 14 May 2008 by the Mons Court of Appeal, the extensive interpretation of the notion of "press crime" was confirmed, this time without a reference to the posterior publication in the printed press. The Court of Appeal ruled that, given the evolution of technology, a punishable writing published on the internet is analogous with punishable content in print publications. Therefore, it should be qualified as a press crime in the sense of article 150 of the Constitution. Several other decisions have applied a similar reasoning, which was ultimately confirmed by the highest court, the Court of Cassation, in two judgments of 6 March 2012.[7] This has resulted in a "revival" of the constitutional cascade system for press crimes.

Liability for Radio and Television Broadcasting

Media laws often establish an objective liability of the broadcaster for all content disseminated through its radio and television channels. The broadcasting laws of

[7] Criminal Court Mons, 13 February 2007, note D Voorhoof, "Is de Publicatie van een Strafbare Meningsuiting via Internet een Drukpersmisdrijf?", *Auteurs&Media* 2007, 178; Court of Appeal Mons, 14 May 2008, note Q Van Enis, "Le Délit de Presse sur Internet: la Cohérence et Rien de Plus?", *Journal des* Tribunaux 2009, 47-50. See also Criminal Court Brussels, 22 December 1999, *Auteurs&Media* 2000, 134; Court of Appeal Brussels, 27 June 2000, *Auteurs & Media* 2001, 142; Court of Appeal Antwerp, 9 February 2006, *Auteurs & Media* 2006, 204; Court of Cassation, 6 March 2012, *Auteurs & Media* 2012, 253.

the Communities in Belgium,[8] for instance, put the editorial responsibility on the broadcaster. This responsibility exists independently from the possibility for the broadcaster of actually reviewing or controlling the content. In November 2004, the CSA (*Conseil Supérieur de l'Audiovisuel*) ruled that the objective liability of the broadcaster is distinct from the personal liability of those who express themselves in the programmes. It can be invoked for all content containing incitements to hatred, discrimination or violence. Even if the broadcaster, *in casu* the RTBF, had no intention of discriminating, the mere fact that the programme contained such content was sufficient for the broadcaster to incur responsibility. Hence, the only question to be examined is whether the content is discriminating or not [*Conseil Supérieur de l'Audiovisuel*, 10 November 2004, *Auteurs&Media*, 2005/2, p 171-173].

It is worthwhile to note that, besides this objective legal liability of the broadcaster, the author or producer can still incur civil or criminal liability under general law.

The reason why broadcasting laws have traditionally focused on the broadcaster (and not the creator or producer of the programmes) as the main responsibility for the content disseminated, becomes clear when looking at the underlying rationale for the initial broadcasting regulations. Due to the scarcity, pervasiveness and immediacy of the medium, broadcasters were attributed an important social responsibility; in return for the use of spectrum, they were made subject to detailed broadcasting regulations and programme obligations. The State was considered to have an increased duty of care to preserve freedom of expression in this sector, and more specifically, to provide for regulations striking an appropriate balance between the broadcaster's communication freedom and the need to protect consumers from harmful content disseminated through this medium. This regulatory tradition contrasts heavily with the "hands-off" approach in print media. The system of objective liability in broadcasting has to be seen in the light of this different regulatory tradition in the audiovisual sector, where it was found to be the most protective of the public interest.

However, the recent advent of on-demand (or non-linear) services has also led to a blurring or an "erosion" of this system. A new actor, the provider of the website for on-demand audiovisual content (usually IPTV or cable, but to a growing extent also the internet and mobile networks), has introduced himself into the production chain and challenges the traditional concept of editorial responsibility. Does the editorial responsibility still entirely lie on the content provider (the broadcaster),

[8] Since the first state reform in Belgium in 1970-1971, radio and television broadcasting fall under the competence of the Flemish, French and German speaking (cultural) Communities. This competence includes not only content-related aspects, but also organizational, economic and technical aspects (such as the attribution of frequency licences). All three Communities have consequently adopted their own broadcasting laws over the last three decades, which have been amended several times. The federal state has only remained competent to regulate the bilingual broadcasting activities in the area of Brussels Capital. The broadcasting rules that are currently applicable in Flanders (and which cover also on-demand audiovisual services) can be found in the new "*Mediadecreet*" of 2009: "*Decreet betreffende radio-omroep en televisie van 27 maart 2009*", published in the *Belgisch Staatsblad* of 30 April 2009 and amended by the "Decreet" of 24 July 2009. In the French Community, broadcasting (in the broad sense) is regulated by the "*Décret sur les services de médias audiovisuals du 27 février 2003*" and the "*Décret portant statut de la Radio-Télévision belge de la Communauté francaise (RTBF) du 14 juillet 1997*", specifically applicable to the RTBF (the public broadcaster of the French Community).

or does it lie on the provider of on-demand services (the website provider)? Or is there a shared responsibility?

The editorial task of the broadcaster works through a system of channel licensing. Channel operations involve a range of discrete activities, such as the commissioning, acquiring and scheduling of programming, the reviewing of programme compliance for consistency with the broadcasting law, the selling of advertising, including the scheduling and the sale of airtime, the playout and presentation of the programme and advertising content into a linear stream, including the provision of on-air programme links and warnings.

Yet, the provision of on-demand services also involves a range of discrete activities, such as the commissioning and acquisition of programming, the review of programmes for content characteristics for the purposes of packaging and labeling, the packaging of programming into Electronic Programme Guide categories, the design and execution of user interfaces for content information and the content control. In such a way, the provision of on-demand services also involves a certain amount of intellectual activity on the content. Discussions have arisen on the notion "editorial responsibility" in the context of the implementation of the Audiovisual Media Services Directive [Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, *Official Journal* L332/27, 18 December 2007], and media regulators are currently grappling with the interpretation of 'media service provider' in the context of on-demand programme services.[9] The growing offer of non-linear services by IPTV, cable, internet or mobile providers indeed raises questions on where the effective control over the content lies and challenges the concept of objective liability of the broadcaster.[10] Moreover, the fact that website providers are more often than the content providers within the geographic reach of media regulators makes it tempting, from the perspective of effective enforcement, to hold them accountable for the content distributed.

Liability for Online Content

The liability of internet intermediaries has been regulated on the European level

[9] R Craufurd Smith. "Determining Regulatory Competence for Audiovisual Media Services in the European Union" (2011) (3) *Journal of Media Law* 263-285; P Valcke, K Lefever & J Ausloos "Audiovisual Media Services 3.0: (Re)Defining the Scope of European Broadcasting Law in a Converging and Connected Media Environment" in Donders, Karen, Pauwels, Caroline & Loisen, Jan, *Handbook on European Media Policy,* Palgrave (in press 2013).

[10] S Nikoltchev (ed.), W Schulz and S Heilmann, *Iris Special: Editorial Responsibility*, Strasbourg, European Audiovisual Observatory, 2008. See also M Ariño, "AVMS Implementation in the UK", Lecture in the IES Spring Series "Rethinking European Media and Communications Policy" at VUB, Brussels, 19 March 2008, who points to the fact that ATVOD members (ie the British Association for Television on Demand) include IPTV platform providers, such as BT and Tiscali (www.atvod.co.uk/).

according to the "hosting model" by the eCommerce Directive.[11] This Directive was transposed in Belgian law in the E-Commerce Act.[12]

The liability of intermediary service providers (ISPs) is discussed in Articles 18 to 21 of the Belgian E-Commerce Act, which follow closely the wording of the Articles 12 to 15 of the eCommerce Directive. In accordance with the Directive, the Act establishes a difference between "mere conduit", "caching" and "hosting" of information. *Mere conduit* consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network. This may include an automatic, intermediate and transient storage of the information transmitted, but only in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission (Article 18). The *caching* of information involves a slightly bigger role for the ISP. It concerns the automatic, intermediate and temporary storage of information provided by a recipient of the service, for the sole purpose of making more efficient the information's onward transmission to other recipients, upon their request. Again, in essence, it consists of the transmission in a communication network of information provided by a recipient of the service (Article 19). Finally, *hosting* consists of the sole storage of information provided by a recipient of the service and at its request (Article 20).

The Directive and consistently, the E-Commerce Act, establish a limitation of liability for ISPs providing these services, under certain conditions. The rules for hosting services might be applicable to certain websites for UGC whose activities are limited to providing technical access and storage services.[13]

According to Article 20 of the E-Commerce Act, ISPs providing hosting services cannot be held liable for the information stored at the request of a recipient of the service as long as the following conditions are fulfilled:

- The provider does not have actual knowledge of any illegal activity or information, nor is aware of facts or circumstances from which the illegal activity or information is apparent;
- When the provider should obtain such knowledge, he acts expeditiously to remove or to disable access to the information.

Moreover, Article 21 of the E-Commerce Act prohibits Member States to impose general monitoring obligations on ISPs that provide mere conduit, caching or hosting services. Nor are the ISPs obliged to actively seek facts or circumstances indicating illegal activities.

[11] EU Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), *Official Journal* L178/1, 17 July 2000.

[12] Wet van 11 maart 2003 betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij, *Belgisch Staatsblad* 17 March 2003.

[13] On this topic see also G Somers and J Dumortier, ICRI-IBBT, KULeuven, "Juridische aspecten van Web 2.0 – online informatie en aansprakelijkheid (content aggregation, content locating en user generated content)", *Cahier du Juriste*, 2/2009, 48-50, 55-56.

The background of this liability exemption for ISPs forms not only free trade, investment and internal market considerations, but also, just as for print publications and broadcasting regulations, the protection of the freedom of expression. Imposing a great risk of legal liability on the ISPs' shoulders would create an incentive for them to heavily censor the information passing through their storage services.[14] Moreover, these merely technical providers are, in principle, not involved with the content of the information transmitted. Only when it comes to their knowledge that illegal or damageable content is made available through the services they provide, it is justified to make them liable.

However, the practical application of this exemption of liability proves difficult. The assessment of the provider's actual knowledge of illegal or damaging content on its website is not easy to make. Further, the rapidity of his reaction is hard to assess since it is impossible to determine the precise moment in which he has obtained knowledge of it. Also, the meaning of the word "expeditiously" was not further defined by the legislator.

The delimitation of internet actors who can potentially benefit from the safe havens of these articles is not totally clear either. To be a host in the sense of Article 20 of the Belgian E-Commerce Act, is it necessary for an ISP to technically host the information on its own servers, or does this also include the case where the provider of an online website uses the services of a third person to technically stock the content?[15] Also, should UGC website providers be seen as a modern version of hosting providers, or are they more than that (given the fact that, in some cases, their role is more important than the mere technical storage)? The role UGC website providers play in the dissemination of content varies from case to case. Some read or edit UGC before publishing it (eg Ohmynews). Some monitor *ex ante* and label UGC before putting it online (eg Dailymotion in its specific programme "Motionmakers"). Some monitor content only *ex post* and take it down upon flagging by users. Some invite particular types of content. Some conclude licensing contracts with professional content producers and some even present UGC as part of their own content (eg Last.fm). The different types of UGC and the different grades of involvement of the website provider make it impossible to formulate a general statement on the application of Article 20 of the Belgian Act, and, in the same sense, of Article 14 of the eCommerce Directive, to UGC website providers.

Due to the development of the Web 2.0, these provisions are also subject to "erosion". First, some Member States have broadened the liability exemption by introducing similar rules for hyperlinks and/or search engines. In this way they wish to create incentives for investment and innovation and enhance the development of e-commerce by providing additional legal clarity for service providers. The

[14] B Frydman and I Rorive, "Regulating Internet Content through Intermediaries in Europe and the USA" (2002) (23:1) *Zeitschrift für Rechtssoziologie* 41-59.

[15] For a discussion on the term "host" (*hébergeur*) see: E Montero, "Les Responsabilités Liées au Web 2.0", *Revue du droit des technologies de l'information*, no 32/2008, 368-373. Crucial for the qualification as a hosting service is the fact that the content was provided by the user and transmitted or stocked at his request. Where in the web 1.0 this was understood in a purely technical way (hosting was the activity of materially stocking third party's content on his server), in the web 2.0 "hosting" is understood in a functional way (it can comprise all forms of stocking, including on someone else's server).

Commission has welcomed these initiatives, because they are in line with the Internal Market objective to ensure the provision of basic intermediary services. However, they create differences in the Member States' regulations of liability for internet content and give rise to inconsistency in the scope of application of each of the exemptions. For example, Spain and Portugal have opted for the hosting model for both search engines and hyperlinks, whereas Austria and Liechtenstein chose the mere conduit model for search engines and the hosting model for hyperlinks (First Report of the Commission on the application of the eCommerce Directive).

Secondly, since the wording of the legislator remains rather vague, case law plays an important role in the interpretation and concrete application of the law. The recent case law from across the EU forms a good example of the contradictory views of judges in real-life cases.

In some cases, the liability of the author is extended to the website provider. In a decision rendered in summary proceedings of 22 June 2007, the Paris TGI qualified Myspace as an editor, because it reasoned that the concrete activities of the provider went beyond those of a host. *In casu*, Myspace imposed presentation structures on its users and foresaw publicity spaces on the users' individual pages, of which it economically benefitted at each page visit. A similar reasoning was applied in the Tiscali case of 7 June 2006 by the Paris Court of Appeal.[16]

In other cases, the liability exemptions of a host are applied to the website provider. In the Lafesse/Dailymotion case, the Paris TGI qualified Dailymotion as a host (*hébergeur*) and not as an editor, since it is not involved in the choice of content. In this case the activities of Dailymotion were considered to be of a purely technical nature. However, being qualified as a host does not necessarily remove all responsibility. In another case involving Dailymotion a few months later, the Paris TGI ruled that although Dailymotion acted as a host, in this case it played a more active role on the content and it has to take on responsibility for that. It points out that the Directive does not install a total exoneration of liability, but only a restriction of liability limited to the cases where the provider "*does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent*". In the Zadig/Google case of 19 October 2007 a similar reasoning was applied, where Google was qualified as a host and found its civil liability engaged because of failing to prohibit the posting of copyright infringing material.[17]

Similar inconsistencies can be found in UK jurisprudence. In *Bunt v Tilley* [2007] 1 WLR 1243 the issue at stake was whether internet service providers (ISPs) who were not alleged to have hosted any website relevant to the claims could be liable simply in respect of defamatory material communicated via the services they provided. According to judge Eady J to be held responsible there must be *knowing involvement in the process of publication of the relevant words*. It was therefore

[16] TGI Paris summary proceedings, 22 June 2007, *Lafesse/Myspace*; and Court of Appeal Paris, 7 June 2006, *Tiscali*, available from www.legalis.net.

[17] TGI Paris, 15 April 2008, *Lafesse/Dailymotion*; TGI Paris, 13 July 2007, *Nord Ouest Production/ Dailymotion*; and TGI Paris, 19 October 2007, *Google Inc./Zadig Productions*, available from www.legalis.net.

held that an ISP which performs no more than a passive role in facilitating postings on the internet cannot be deemed to be a publisher at common law.

A similar reasoning was applied in *Metropolitan International Schools Ltd v Designtechnica Corpn* [2011] 1 WLR 1743. This case concerned defamatory comments which, having been posted on a website, appeared as a "snippet" of information when an internet search was carried out under the claimant's name on Google Inc's search engine. A mental element, as defined in *Bunt v Tilley*, was required to hold a person responsible for publishing of defamatory statements. As to the position of Google after it had been informed of the defamatory content, a distinction was made between removing offensive content by a search engine and someone hosting a website. As a result, the judge ruled that Google cannot be held liable on the basis of authorisation, approval or acquiescence.

In *Tamiz v Google Inc* [2013] EWCA Civ 68 (14 February 2013), a question was asked about qualification of the role of the service provider with regard to an anonymous comment on its blogging service (Blogger.com). In the first instance the High Court of Justice found Google not to be a publisher of the words complained of, whether before it was notified of the complaint or after such notification. Instead, Google's position was described as a "purely passive" platform provider. As such, Google "*was not required to take any positive step, technically, in the process of continuing the accessibility of the offending material.*"[18] The Court of Appeal, however, held that Google may be deemed a "publisher" of (and held liable for) defamatory user-generated content appearing in blogs hosted by Google [particularly][19] after being notified of the content's defamatory nature.[20] [Injunctions can occur regardless of liability issues.[21]]

Where Do UGC Websites Fit In?

When comparing the three chains of actors, active in print publications, in broadcasting and in internet content, we can generally establish three types of activities. First there is the act of *creating* the information. This is followed by the intellectual act of *selecting* within this information, *aggregating* it and *publishing* it. The final step is the technical act of *distributing* the information or providing *access* to it.

In print publications, the *source of the information* is the author or journalist. In broadcasting, it is the producer and in internet content it is the content producer, either professional or amateur. The *intellectual act of selecting and publishing* is done by

[18] See also *Bunt v Tilley* [2007] 1 WLR 1243.

[19] Editor addition.

[20] See also *Trkulja v Google Inc LLC & Anor (No 5)* [2012] VSC 533 (12 November 2012), and *Trkulja v Yahoo! Inc LLC & Anor* [2012] VSC 88 (15 March 2012). In both cases in Australia, Google and Yahoo were considered publishers for defamatory content returned as a result to a search query about an individual. In both cases it was considered that providers of the search services were involved in the act of innocent dissemination, similar to those of newsagents or libraries. Their liability for these acts, however, has only been recognized from the moment they received complaints about the content, on which they did not act. See also *A v Google New Zealand Ltd* [2012] NZHC 2352.

[21] Editor addition.

the editor and/or publisher in print publications, by the broadcaster in broadcasting and by the information service providers in internet content. The *technical act of distributing or providing access* is done by the printer and the bookstore or kiosk in print publications, by the network operator and the provider of consumer devices (such as decoders) in broadcasting and by access providers, network operators and providers of consumer devices for internet content.

Although the function of the actors performing these three activities is similar in each media type, the regulation of liability is different.

In print publications the liability lies (in Belgium) in principle on the author, but may, in some circumstances and by way of exception, also involve the editor and publisher (eg when the author is unknown). In broadcasting, legal liability traditionally focuses on the broadcaster, but is recently expanding towards the distributor or website provider. For internet content, the content producer is in principle responsible for his content, but very often access providers are sued in his place.

So, where do UGC websites fit in? In order to answer this question, we should start looking at which of the three activities mentioned above they perform. Since UGC website providers are not the source of the information themselves, the question is basically whether they perform the intellectual act of selecting and publishing or whether they act as technical intermediaries who merely host or provide access. The difference in responsibility lies in the intellectual or technical character of the intervention. Where the *intellectual* act of editing and publishing involves a value judgment on the content which justifies legal liability, the purely *technical* act of hosting information and making it available to the public does not involve liability for the content. Is a UGC website provider an editor or a publisher, who makes content available in such a form that it can be disseminated towards the public under his responsibility? Or is he a mere host, who makes third party content available, at their initiative, through technical services?

There is no uniform answer to this question. The intellectual or technical character of the UGC website owner's activities should be determined on a case by case basis, dependent on a range of criteria. From the existing case law we can however derive that there is actually no consensus about what constitute significant criteria[22]:

- The concrete activities of the website provider. In the Dailymotion case of 13 July 2007 [TGI Paris, 13 July 2007, *Nord Ouest Production/ Dailymotion*, available from www.legalis.net], the Paris TGI ruled that although the activities of Dailymotion are in principle only technical, it cannot be denied that the website provider plays a more active role regarding the content and that it is aware that illegal material is posted. Dailymotion is condemned to pay damages because of the presence of an intentional element;
- The imposition of a frame-based structure or format. In the Myspace case of 22 June 2007 [TGI Paris summary proceedings, 22 June 2007,

[22] See also E Montero, "Les Responsabilités Liées au Web 2.0", *op cit*, p 373-379; N Jondet, "The Silver Lining in Dailymotion's Copyright Cloud", 19 April 2008, available from www.juriscom.net.

Lafesse/Myspace, available from www.legalis.net] it was decided that imposing presentation structures on the users increases the involvement of the website provider. However, a few months later, the same court ruled in Google/Zadig Productions that offering users an architecture and the technical means to classify content cannot justify a qualification as an editor, since the content is furnished by the users themselves[23];

- The business model. Since the Paris Court of Appeal qualified Tiscali as an editor because of putting publicity announcements on the users' personal pages, the presence of publicity on the website can be of importance [Court of Appeal Paris, 7 June 2006, *Tiscali*]. In the Myspace case of 22 June 2007, the fact that the website provider was making money with the user's content manifestly added to his qualification as an editor. However, in the Dailymotion case of 15 April 2008, the Paris TGI ruled that the commercialisation of publicity spaces cannot justify a qualification as an editor;
- A website provider can be qualified as a host for some activities and an editor for others. For example, Dailymotion created the "Motionmaker" programme to explicitly promote creators of content and their UGC. Dailymotion actively participates by selecting the creators and reviewing and validating the content, a process in which it has an absolute discretion. The terms of the programme state explicitly that "*upon validation, Dailymotion will become the publisher and not merely the host [of the "Creative Content"]*".[24] However, for the content published on the website, outside of this specific program, Dailymotion is considered a hoster and benefits of the limitation of liability from the eCommerce Directive;
- The mental element. In the UK a number of cases involving different types of ISPs was ruled on the basis of the existence of "*knowing involvement in the process of publication of the relevant words*". Such reasoning was used in *Bunt v Tilley* as well as *Metropolitan International Schools Ltd v Designtechnica Corpn* where the judge ruled that a passive ISP cannot be deemed to be a publisher. As a consequence, such ISP is also not required to "*take any positive step, technically, in the process of continuing the accessibility of the offending material*". This opinion, however, has been rejected in *Tamiz v Google* by the Court of Appeal, which ruled that ISP can be considered and held liable as a publisher for defamatory user-generated content [particularly] after being notified about such character of this content.

Not only the assessment of the degree of liability of each of the actors involved in the publication of UGC, but also the actual and efficient enforcement may prove

[23] TGI Paris, 19 October 2007, *Google Inc./Zadig Productions*, available from www.legalis.net. See also: TGI Paris summary proceedings, 26 March 2008, *Olivier Martinez/Bloobox Net*, available from www.juriscom.net; TGI Nanterre summary proceedings, 28 February 2008, *Olivier C./Eric D.*; and TGI Nanterre summary proceedings, 28 February 2008, *Olivier D./Aadsoft Com*, available from www.legalis.net. In these cases the platform providers were qualified as editors because of the presentation structure consisting of RSS links to other websites.

[24] N Jondet, "The Silver Lining in Dailymotion's Copyright Cloud", *op cit*. This is an application of the functional understanding of the term "hoster", *cf.* E Montero, "Les Responsabilités Liées au Web 2.0", *op cit*, p 368.

difficult. A key element in this enforcement is whether the real author is known or not. The first question is to what extent a website provider is obliged to identify the users active on its website. In case law the answer varies from an obligation to conserve the user's IP and email address to the more far-reaching obligation to also ask for his name, first name, domicile and phone number.[25] The second question is whether the website provider, knowing the real identity of the users on its website, is allowed or obliged to reveal it to the authorities. Both questions raise privacy issues which are not further explored here.

Conclusion

What can we learn from the analysis of the existing liability regime for print publications, broadcasting and internet content, for our initial question about the appropriate regulation of liability for UGC?

The publisher model, encompassing the closely related, but not identical regimes for print publications, on the one hand, and broadcasting channels, on the other hand, principally links legal liability to the production and editing of content. Legally liable are the author (at the origin of the content) or the broadcaster (carrying editorial responsibility). Could this be applied to UGC? It is true that also for *non-professional* content on the internet, the basic responsibility lies with the author. It is mainly the difficulty of identifying him, acting against him and enforcing judicial decisions on him that justifies the involvement of other actors in the value chain. Hence, applying the model for print publications as it exists in Belgium, starting from the presumption that the author is usually easily identifiable and imposing liability on the editor and publisher only when the author is not known and not resident in Belgium, on liability for UGC does not seem realistic. Nevertheless, a similar approach can be found in the recently passed Defamation Act in the UK, which offers protection to website operators for third parties' content, however, only when the identity of the author is readily available to the complainant.[26] The impact of this new legislation is yet to be seen as its implementation will largely depend on assisting, detailed regulations that are currently missing.

It should not be forgotten, however, that the activities of the website provider often also include intentional elements, creating a similarity with the editorial activities of a broadcaster. This means that the imposition of legal liability on the website provider could, to a certain extent, be based on the logic underlying the publisher model, more specifically the regime for broadcasting, namely the presence of editorial activities and editorial responsibility similar to those of a broadcaster.

What the print and hosting models have in common is the shared concern to shield the intermediaries (respectively editors and publishers, and internet providers) from [some] legal liability for third party content in the interest of freedom of expression

[25] TGI Paris summary proceedings, 7 January 2009, *Lafesse/Youtube*, legalis.net; TGI Paris, 14 November 2008, *Lafesse/Youtube*, legalis.net; C George, "Web 2.0 and User-Generated Content: Legal Challenges in the New Frontier", *Journal of Information, Law and Technology*, http://go.warwick.ac.uk/jilt/2007_2/george_scerri.

[26] See UK Defamation Act 2013, available at: http://www.legislation.gov.uk/ukpga/2013/26/contents/enacted.

(to avoid any form of private censorship). The hosting model therefore puts forward a conditional "safe haven", ie a liability exemption under certain circumstances, for hosting services, as provided for in the European eCommerce Directive and Belgian E-Commerce Act. However, it seems difficult to apply this rule in all situations to UGC website providers because of their wide variety and the impossibility to generally classify them as either hosts or editors. Still, depending on the case, UGC website providers may benefit from the safe havens of the E-Commerce Act when it can be assessed that they provide mere technical services without knowledge of the content. The assessment is done on a case-by-case basis by the courts, resulting in a problematic legal uncertainty.

The study of IDATE, TNO and IViR finds that:

> *"deciding about the extent to which information services can be required to monitor and "censor" third parties' material is a matter of finding the right balance between a number of important, often constitutionally protected interests and rights".*

On the one hand, public interest values, such as protection of minors and human dignity, plead for a far-reaching liability for third party content. The media have a social responsibility to protect against illegal and harmful material in view of consumer and citizen protection and the protection of the public legal order. Also, since it is practically impossible for injured parties to act against the real author, the efficiency of enforcement requires the involvement of intermediary actors.

But on the other hand, equally important constitutionally protected rights defend a limited liability for third party content. In the first place, freedom of expression would be severely compromised. Making UGC website owners liable for content disseminated through their website would involve a risk of excessive censorship by them out of fear for prosecution. There is also a concern of fairness towards the UGC website providers. Putting the whole issue of liability for illegal and harmful content on their shoulders would expose them to an excessive financial, technical and legal burden. It is often impossible for them to monitor all activities on their website, because of technical and financial reasons. Besides that, when their liability is invoked, the legal burden is even more heavy. Finally, there is the issue of privacy protection. Website owners might have to infringe privacy rules when revealing the identity of the real author of illegal or harmful content.

Finding the right balance between these contradictory interests is a difficult task, albeit a crucial one. A well-defined regulation on liability for UGC would improve legal certainty and increase the general feeling of safety on the internet. Several attempts to achieve it have been undertaken recently. A first example is the new Defamation Act in the UK which we mentioned before and which is considered to be a major upgrade to the previous UK's outdated and repressive libel laws. However, it is not entirely clear yet how its provisions will interact with the rules set by the eCommerce Directive. Secondly, the eCommerce Directive itself is currently under review with special attention being given to the issues of ISP's liability for third parties' content. Also, the European Commission's initiative on Notice-and-Action aims for more legal certainty and harmonisation by providing more detailed rules on removing illegal or harmful content from the Internet. In this initiative, the European Commission focused on transparency, effectiveness, proportionality and

fundamental rights compliance of the Notice-and-Action procedures. Consultations with stakeholders were held in 2012 and their results are expected in the course of 2013. The exact impact of these initiatives on the liability for UGC remains to be seen and will certainly merit further publications on this topic.